Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 76-636

BUCKLEY TOWERS CONDOMINIUM, INC.,
a non-profit Florida condominium corporation,
on behalf of itself and its members-unit owners,

Petitioner

vs.

HERBERT BUCHWALD, individually and as
trustee, and BUCKLEY DEVELOPMENT
COMPANY, LTD.,

Respondents

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

CASE NO.

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida condominium corporation, on behalf of itself and its members-unit owners,
Petitioner

versus

HERBERT BUCHWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Buckley Towers Condominium, Inc., a non-profit Florida Condominium corporation, on behalf of itself and its members-unit owners, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 17, 1976, reported at 533 F. 2d 934 (5th Cir. 1976), reh. den. September 21, 1976.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 533 F.2d 934 (5th Cir. 1976). The opinion of the United States District Court for the Southern District of Florida appears at 399 F. Supp. 38 (U. S. D. C. So. Fla. 1976).

## JURISDICTION

The Judgment of the Court of Appeals (App. 9) was

entered on June 17, 1976. A timely Petition for Rehearing with a suggestion of rehearing en banc was denied on September 21, 1976 (App. 12). This Courts jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

## STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. 1) provides in part:

> "Every contract...in restraint of trade or commerce among the several states...is declared to be illegal..."

Section 2 of the Sherman Act (15 U.S.C. 2) provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states..."

Section 15 of the Sherman Act (15 U.S.C. 15) provides in part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States in the District in which the Defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained..."

Section 26 of the Sherman Act (15 U.S.C. 26) provides in part:



> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any Court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the Antitrust Laws, including Sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against theatened conduct that will cause loss or damage is granted by courts of equity..."

Section 2201 of the Declaratory Judgment Act (28 U.S.C. 2201) provides in part:

> "In a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought..."

## QUESTIONS PRESENTED

I. Does a non-profit corporation, which is a party to a business contract with a profit making entity have standing to bring an action under the antitrust laws on behalf of itself and/or on behalf of its membership for declaratory judgment and other relief, alleging antitrust violations arising from the business contract.

II. Does the filing of an independent antitrust complaint by a member of a non-profit corporation preclude the right of the non-profit corporate entity from appellate review of the dismissal with prejudice of a prior action filed by the non-profit corporate plaintiff.

III. Can a statute or law of the State of Florida, incorporated by reference in a private contract or agreement between two parties, effectively preclude the application of the anti-trust laws of the United States to the private contract.

## STATEMENT

Buckley Towers Condominium, Inc., is a non-profit corporation formed under the laws of the State of Florida and is vested with general corporate powers, and additional powers granted Condominium Corporations in Fla. Stat. 711.12, (App. 1), (App. 3).

Buckley Towers Condominium, Inc. is merely one of thousands of condominium corporations or associations which were incorporated pursuant to the foregoing statutes in the State of Florida and similar statutes in other states, in order to conduct the affairs, contract for and, generally, have the responsibility for all legal and other matters concerning condominiums.

The Condominium concept necessarily arose since ownership of a private, single-family residence has become financially impossible for the average wage earner or elderly retired in the United States, spawning the need for alternate types of residential housing, including the explosive growth of condominiums.

No national legislation or policy existed or exists for the regulation of condominiums, which left seekers of housing subject to the mercy of and reliance upon the individual condominium developers, usually corporate entities. As a result, developers were able to, and continue to, impose onerous contracts and agreements on the development.



In the instant case, which is concededly substantially similar to a myriad of other condominium developments, the builders-developers of the Buckley Towers Condominium directly or indirectly controlled all entities responsible for the building and initial operations of the Buckley Towers Condominium, including interrelated and controlled corporations responsible for the construction, sale and operation of the Condominium and instituted both short and long term contracts (some exceeding 90 years in length) on the development.

Among the contracts entered into in the beginning stages of the Buckley Towers Condominium development, through entities which were wholly and absolutely controlled by the respondents in this case were:

1. A mandatory ninety-nine (99) year lease agreement for "recreation areas" between respondent, Herbert Buchwald, Trustee and Petitioner, which required, among other things, payment of the last two months of the 99 year term, monthly rentals in excess of $18,000.00 per month, to be increased pursuant to the consumer price index at periodic intervals for the entire term of the 99 year lease with payment of the lease not being discretionary but absolutely required of the Condominium Association, Petitioner herein, for the entire 99 year term, including payment of all costs of the lease, maintenance, repairs, legal fees, etc.

2. A long-term managment agreement which provided that the developers of the Buckley Towers Condominium, through controlled entities, be permitted to manage the condominium association for many years and which provided for fees to be paid

> to the mangement company solely on the basis of monies expended by the management company and without regard to the efficient management of the condominium or any other criteria.

The rental and other costs of the 99 year "recreational lease" was concededly set without any basis or relation to the cost of the improvements contained in the "recreational lease area" and is hugely in excess of any reasonable return for the premises when computed by any rational or commonly used formula of any nature.

The lease was entered into by developer-controlled entities at the time that Buckley Towers Condominium, Inc., Petitioner, was controlled solely and absolutely by designees of the respondents and the membership of Petitioner was permitted absolutely no voice or control in the setting of the terms of the 99 year lease or the desirability of entering into the lease in the first instance. The lease contract was imposed on petitioner by respondents.

Petitioner is the lessee on the lease contract complained of below and the individual members-unit owners of petitioner are contractually bound as guarantors of the performance of petitioners. Members are obliged to pledge the ownership interest in their individual condominium dwelling units, on a continuing basis, to guarantee the performance of the 99 year "recreation" lease.

When the lease contract became too onerous for Petitioner to bear, Petitioner filed suit on behalf of itself and its members, in the United States District Court for the Southern District of Florida for relief from the continuing lease contract, alleging that it was continually violative of the antitrust laws of the United States and that, as a result of such



continuing violations, Buckley Towers Condominium, Inc., on behalf of itself and its membership-unit owners, was entitled to relief from the continued imposition of the contract, damages and other relief.

Respondents, Herbert Buchwald, individually and as trustee-lessor, and Buckley Development Company, Ltd., moved to dismiss the action for lack of jurisdiction, alleging, among other things, plaintiff's lack of standing to sue as a person injured in its business or property (App. 4).

Plaintiffs, responded to the Motion to Dismiss (App. 5) and moved for an evidentiary hearing as to the jurisdictional matters involved in the cause (App. 6).

The Court denied the defendants motion for evidentiary hearing on the question of jurisdiction (App. 7) and entered an Order of Dismissal (App. 8).

Ultimately, an appeal from the Order of Dismissal was taken to the United States Court of Appeals, Fifth Circuit, and, in an opinion rendered on June 17, 1976, reported at 533 F. 2d 934 (5th Cir. 1976), (App. 9), the United States Court of Appeals affirmed the dismissal, finding that a non-profit Condominium corporation does not have standing to sue on behalf of itself and/or its membership in an action predicated upon the violation of the antitrust laws of the United States, even though the condominium corporation is a party to a contract claimed to be illegal, since the condominium association is only "nominally liable" for the payment of the contract and for the additional reason that in the strict sense, a non-profit Condominium Corporation has no commercial interests or enterprises and additionally, could not "demonstrate a loss or injury cognizable in equity approximately resulting in the alleged antitrust violations, even under

the eased requirements of Section 16 (15 U.S.C. 26)".

Additionally, the appellate court apparently reasoned that since a suit had been brought by an individual residing in the Buckley Towers Condominium Complex, after the dismissal of the instant cause which also alleged violations of the anti-trust laws of the United States, (Ignatz Spitz, etc., et al., vs. Herbert Buchwald, etc., et al., S. D. Fla. 75-1549- Civ-JLK, dismissed with prejudice) (App. 10), that this too was sufficient reason for the denial of review and upholding the dismissal of the anti-trust action below.

The Court of Appeals based its decision upon 7 representative cases relating to standing:

*Battle vs. Liberty National Life Insurance Company*, 5th Cir. 1974, 493 F. 2d 39, cert. den., 1975, 419 U.S. 1110, 95 S. Ct. 784, 42. L. Ed. 2d 807.

*Hawaii vs. Standard Oil Company of California*, 1972, 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184.

*Dailey vs. Quality School Plan, Inc.*, 5th Cir. 1967, 380 F. 2d 484.

*Martin vs. Phillips Petroleum Company*, 5th Cir. 1966, 365 F. 2d 629, cert. den. 385 U.S. 991, 87 S. Ct. 600, 17 L. Ed. 2d 451.

*Zenith Radio Corp. vs. Hazeltine Research*, 1969, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2nd 129.

*Geoffry vs. Southwestern Bell*, 5th Cir. 1975, 518 F. 2d 1129.



*Credit Bureau Reports,Inc. vs. Retail Credit Company*, 5th Cir. 1973, 476 F. 2d 989.

The holding concluding that Buckley Towers Condominium, Inc., was not a "purchaser" of a condominium unit or owner of a unit at the time the complaint was filed and therefore could not state a claim upon which relief could be granted, even though it was a party to the contract in quo and could be sued on the contract in State court.

The Court apparently did not feel it necessary to take into consideration applicable portions of the Corporate Charter, the Declaration of Condominium, State Statutes and other authority giving the Petitioner Condominium Association the right to maintain a suit on behalf of itself and/or its membership in matters of common interest. Nor did the Court of Appeals recognize the right of a corporate condominium association to maintain a suit in its capacity as a party to a contract claimed to be violative of the antitrust laws of the United States.

The decision has effectively denied access to the United States District Court to condominium corporations throughout the United States which seek redress for antitrust violations arising from contracts imposed on them.

The wide application of the ruling, already cited as authority for lack of standing on the appellate level, necessitates this application for Writ of Certiorari on behalf of the Petitioner Condominium Association and its membership.

## REASONS FOR GRANTING THE WRIT

I. The Court of Appeals failed to recognize the ample precedent in other circuits permitting, and

> the necessity for permitting, a corporate condominium association standing as a party to a contract and as the reasonable representative of all of its members-unit owners, to seek relief for claimed antitrust violations arising from the mandatory imposition of the contract.

The main premise of the adverse decision below appears to be that a non-profit condominium corporation lacks standing to sue for injury to itself or its members-unit owners since:

> (1) It is not the proper representative for its members-unit owners.
>
> (2) A condominium corporation cannot suffer damage or injury to its business or property in the sense required for standing contemplated by the antitrust laws of the United States.

The decision appears to conflict with (1) decisions of other Courts of Appeal and (2) decisions of this Court concerning questions of standing. The question involved is substantial since many thousands of similar condominiums and non-profit entities will be affected and a basic necessity of life, housing, is involved. It should be heard and decided by this Court.

Since a mandatory 99 year lease is involved, there can be no argument with the proposition that *prospective* relief is sought by petitioner, in addition to any damages which may be found.

Assuming *arguendo* that Petitioner is not "injured in its business" Petitioner may still have standing pursuant to 15



U.S.C. 26 to seek injunctive relief designed to prevent harms which may be unrelated to competition, when that relief serves the antitrust function of ending ongoing violations. *Georgia vs. Pennsylvania R. Co.* 1945, 324 U. S. 439, 65 S. Ct. 716, 89 L. Ed. 1051. In *Georgia vs. Pennsylvania, supra,* this Court held that the State of Georgia could seek relief to enjoin certain railroad companies from conspiring to fix discriminatory railroad rates to the detriment of the State of Georgia's economy. The 9th Circuit has adopted and followed this proposition which distinguishes standing requirements for *prospective* relief as opposed to the standing requirements for *past* damages. *In re: Multidistrict Vehicle Air Pollution: State of Washington, et al vs. Automobile Manufacturers Association, et al.,* 9 Cir. 1976, 538 F. 2d 231., at 237, noting that:

> "The ommission of the words "business or property" in Sec. 16 certainly makes that section "far broader that (sic) Sec. 4." *Hawaii vs. Standard Oil Company,* 9 Cir., 1970, 431 F. 2d 1282, 1284, aff'd. 1972, 405 U. S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184.

It can not follow that when Congress adopted Sec. 16 (15 U.S.C. 26) it intended to permit remedies which would serve none of the purposes for which the law was passed.

Plaintiffs who have not been injured in their *business* or property, do have standing to seek injunctive relief designed to prevent harm which may be unrelated to competition, when that relief serves the antitrust function of ending an ongoing violation.

Like Petitioner, a State is not an enterprise for profit nor is it generally regarded to be in the commercial sector. A

state is a non-profit entity.

The 7th Circuit in a recent decision has found standing on behalf of the State of Illinois in a treble damage action, even though the State of Illinois was not a direct purchaser to the products involved (concrete block) but instead purchased buildings of which the concrete block was merely a partial component.

In *reversing*, The District Court's dismissal of the action, the 7th Circuit stated:

> "In private actions seeking to vindicate rights conferred by Congressional Enactment, to establish standing the Plaintiff must show an injury in fact that is "arguably within the zone of interests to be regulated by the statute." *Association of Data Processing Service Organization, Inc. vs. Camp*, 397 U. S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184; *Malmud vs. Sinclair Oil Company*, 521 F. 2d 1142, 1151-1152 (6th Cir. 1975); *State of Illinois vs. Ampress Brick Company, Inc.*, at 1165.

The 7th Circuit, in electing to follow the standing requirements of the 6th Circuit, 9th Circuit and this Court, cited the "broad reach of a treble damage action under the Sherman Act as stressed in *Mandaville Island Farms, Inc. vs. American Crystal Sugar Company*, 334 U. S. 219, 236, 68 S. Ct. 996, 1006, 92 L. Ed. 1328", where the, "Supreme Court noted that the Sherman Act does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.... but held that the Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."



In fact, contrary to the privity requirement now prevailing in the 5th Circuit, other circuits and, apparently this Court, *have removed the privity requirement* in an antitrust cases for purposes of standing. *In re Multidistrict Vehicle Air Pollution M. D. L. #31* (9 Cir. 1973), 481 F. 2d, 122, at 129; *South Carolina Council of Milk Products, Inc., vs. Newton*, (4 Cir. 1966), 360 F. 2d 414, 417-418, cert. den. 385 U. S. 934, 87 S. Ct. 295, 17 L. Ed. 2d 215 (1966); *Armco Steel Corp. vs. North Dakota* (8th Cir. 1967), 376 F. 2d 206, 210-211.

The 5th Circuit, in its decision denying standing to Petitioner in this instance, squarely held that standing under Sec. 4 of the Clayton Act, is limited exclusively to first-line purchasers, even though the plaintiff below, the corporate condominium association, which was a *party* to the lease contract complained of is liable for payments under the lease, and is the entity which bears the burden of the illegal 99 year contract for the unwanted "recreational facilities."

Respectfully, the 5th Circuit misapplied the decisions upon which it relied to deny Petitioner standing. The misapplication is understandable since:

> Standing, ...is still in the course of development in the law. (citations omitted), in re *Western Liquid Asphalt cases: State of Alaska, et al vs. Standard Oil Co. of California, et al.*, 9 Cir. 1973, 487 F. 2d 191, cert. den. 94 S. Ct. 1419 (1974).

The 9th Circuit, in elucidating further on the question of standing also stated:

> "Direct proof of payment is not required, of course, because to require it could prevent enforcement of

the antitrust laws. *Bigelow vs. Arko Radio Pictures, Inc.*, 237 U.S. 251, 264-265, 66 S. Ct. 574, 90 L.Ed. 652 (1946), *in re Western Liquid Asphalt Cases, supra, at 200.*

The 5th Circuit rejects the position of the 9th, 6th and 7th Circuits, creating conflict among the circuits.

Petitioner is the *lessee* of the 99 year lease contract complained of in its suit before the United States District Court.

It would appear that the causal relationship is obvious from the complaint (App. 11). Privity, though not even required in other circuits, exists in this case and the claim for prospective relief as well as damages, is also apparent.

It is difficult to understand how a continuing course of events and contracts...conceived, executed and set in force for a period of 99 years by the respondents should now be used as a shield by respondents and the Courts to deny standing to a corporate entity which is clearly responsible, by the very terms of the contract complained of, for payment of enormous sums of money each year to defendants.

II. Can a statute or law of the State of Florida, incorporated by reference in a private contract or agreement between two parties, effectively preclude the application of the antitrust laws of the United States to the private contract.

The State of Florida has eradicated any distinction whatsoever between a non-profit condominium corporation and a corporation for profit and defendants-respondents, who operate in Florida, should not now be permitted to raise the non-profit status of petitioner, which was caused by respon-



dents, as a defense to petitioner's standing. *Fountainview Association, Inc., #4, a Florida corporation not for profit, and Fountainview Association, Inc., #5, A Florida corporation not for profit vs. Bell, et al.*, 203 So. 2d 657 (Fla. App. 1967).

> "...in the enactment of the Florida Condominium Act, the legislature chose to permit an association that operates such a project to function as, but not limited to, a corporation for profit and as a corporation not for profit. See: 711.12(1) Fla. Stat., F.S.A. Therefore, in construing the Statute, it is apparent that the legislature considered that each of the same class should be treated equally...therefore, although the promoters caused corporations not for profit to be organized, they could have organized corporations for profit and we hold that their conduct is governed by the rules applicable to private corporations for profit..."

Petitioner's damage is not merely incidental or inconsequential, nor can it seriously be questioned that its very existence is mandated solely for the purposes of representing its members-unit owners, in contractual matters, litigation, etc. Were this not the case, there would be absolutely no reasons for the initial formation or the continuance of Petitioner as an entity recognizable in law.

Since no evidence on these substantial questions was permitted to be proffered or placed before the Court by testimony, or other proofs, (App. 7), it would appear that Petitioner has been improperly denied access to the Courts to vindicate a right vested in it by the antitrust laws of the United States.

The conclusion by the Court of Appeals that Plaintiff is not an entity in the commercial sphere is unfounded in fact and contrary to the proofs which were not allowed to be presented. Evidence should have been permitted on this question since a Condominium Association with more than 1000 unit owners has a yearly budget in excess of that of may municipalities, with the attendant purchases, contractual obligations, assessments, collections, etc.

In fact, Buckley Towers Condominium, like each of the thousands of other condominiums in the United States, must operate profitably and meet its obligations or be subject to the attendant commercial sanctions, including, but not limited to bankruptcy, suits at law, etc.

## SAVING OF JUDICIAL LABOR

If Petitioner were permitted to maintain the action below on behalf of itself and its mandatory membership (unit owners), the action would effectively end the necessity for Petitioner's members to guarantee Petitioners' performance of the 99 year lease contract and would obtain complete relief for all members of Plaintiff as well as Plaintiff itself. *National Motor Freight Traffic Association vs. United States,* 372 U.S. 246, 9 L. Ed. 2d 709, 83 S. Ct. 688 (1963); *Association of Data Processing Service Organization, Inc. vs. Camp,* 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970), *Warth vs. Seldon,* 1975, 422 U. S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343. One injunction is as good as 1000 injunctions.

As a party to the objectionable contract, coupled with the fact that Petitioner exists solely for the benefit of its members-unit owners, it is axiomatic that individual participation of each of petitioners members is not necessary or indispensible to a proper resolution of the cause before the United States District Court.



In fact, a favorable result achieved by Petitioner would obviate the need for separate suits by each of the individual members in addition to voiding the objectionable mandatory contractual entanglements.

III. Did the District Court abuse its discretion or err by refusing to allow Buckley Towers Condominium, Inc., to file an amended complaint in the cause or join such parties as, in the view of the District Court were necessary to be joined in the action as proper parties plaintiff.

Petitioner could not be a member of any class action instituted by any of its members-unit owners. In fact, Respondents take the position that no unit owner of petitioner can bring an action on behalf of petitioner (Fla. Stat. 711.121) since "no unit owner may act for the Association."

The Court of Appeals appeared to be of the view that an action instituted by one of the unit owners might preclude the necessity for petitioners joinder in or bringing an antitrust action, however, the District Court also dismissed that suit (App. 7).

Since the dismissal below was for failure to state a claim upon which relief could be granted, without any responsive pleading having been filed or required and no judgment entered, it would appear that an amended complaint should have been permitted as a matter of right or proper discretion. *Costello vs. United States,* 365 U.S. 265, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961):

> "...we think that...if the first suit was dismissed for defective pleadings, or parties, or a misconception of a form of proceeding, or the want of jurisdiction, or was disposed of on any grounds which did not go to the merits of the action, the judgment rendered will prove no bar to another suit... we do not discern in Rule 41(b) a purpose to change the common law principal with respect to dismissal in which the merits could not be reached for failure of the Plaintiff to satisfy a precondition." *Costello, supra, at 545.*

See also: e.g. *Conley vs. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1960).

There appears to be no serious question that the practices complained of in the complaint below, if proven, constitute per se violations of the antitrust laws of the United States. *Miller, et al vs. Granados,* 5th Cir. 1976, 529 F. 2d 393, (setting forth the proposition that mandatory contracts entered into by a Condominium Association of the type involved in the cause below would, if proved, constitute per se violations of the antitrust laws of the United States.)

The central questions presented by the United States Court of Appeals seems to be entirely technical in nature and not supportable by the citations of authority relied upon by that Court in its decision.

Additionally, and equally important, is the problem that a class certification might not be possible in cases of this type since each member-unit owner, may well be required to separately show coercion on an individual basis for acceptance of the tied product or liabilities in view of the 5th Circuit opinion.



Thus, the implication in the decision of the United States Court of Appeals, that a class action might be permissible, may well be erroneous. *Unger vs. Dunkin' Donuts of America, Inc., et al., vs. Dunkin Donuts, Inc.,* 3 Cir. 1976, 531 F. 2d 1211, holding that *each* individual of a proposed class must prove coercion and, accordingly the certification of a class with respect to antitrust tying claims could not be approved.

If indeed this is the state of the law, then Petitioner *and* its membership may well be without any remedy whatsoever for redress of per se violations of the antitrust laws of the United States which have damaged petitioner and its membership both through contract and by combination, scheme, agreement, etc.

## CONCLUSION

For the foregoing reasons, showing of conflict among the circuits and in view of the importance and wide application of the questions presented to this Court, it is respectfully prayed that the Petition for a Writ of Certiorari be granted.

Respectfully submitted:

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## CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed this 21st day of October, 1976 to Darrey A. Davis, Esq., Steel Hector & Davis, 1400 S. E. 1st National Bank Bldg., Miami, Florida.

By:
Joseph S. Paglino, Esq.

Printed copies mailed this
day of November, 1976.



## APPENDIX

Appendix 1 - Fla. Stat. 711.12

Appendix 2 - Fla. Stat. 711.121

Appendix 3 - Notice of Filing Annexation to Complaint

Appendix 4 - Motion to Dismiss

Appendix 5 - Response to Motion to Dismiss

Appendix 6 - Motion for Evidentiary Hearing

Appendix 7 - Order Denying Plaintiff's Motion for Evidentiary Hearing on Jurisdictional Issue

Appendix 8 - Order of Dismissal

Appendix 9 - Opinion in Buckley Towers Condominium, Inc. etc., vs Herbert Buchwald, etc.

Appendix 10 - Complaint

Appendix 11 - Denial of Petition for Rehearing

(c) Such other provisions not inconsistent with this law or with the declaration as may be desired.

History and Source of Law

Derivation:
Laws 1963, c. 63-35, § 11.

Library References

Associations ⇐5. C.J.S. Associations § 11.

## 711.12 The association

(1) The operation of the condominium shall be by the association, the name of which shall be stated in the declaration. The declaration may require the association to be organized as a particular entity, such as but not limited to a corporation for profit or corporation not for profit, in which the owners of units shall be stockholders or members.

(2) The association, whether or not incorporated, shall be an entity which shall act through its officers and shall have the capability of contracting, bringing suit and being sued. If not incorporated the association shall be deemed to be an entity existing pursuant to this act and shall have power to execute contracts, deeds, mortgages, leases and other instruments by its officers. Service of process upon the association if not incorporated may be had by serving any officer of the association or by serving the agent designated for service of process. Service of process upon the association shall not constitute service of process upon any unit owner.

(3) No unit owner, except as an officer of the association, shall have any authority to act for the association.

(4) Unless limited by the declaration the powers and duties of the association shall include those set forth in this law. The powers and duties of the association shall include also those set forth in the declaration and bylaws.

(5) The association shall have the irrevocable right to have access to each unit from time to time during reasonable hours as may be necessary for the maintenance, repair or replacement of any common elements therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common elements or to another unit or units.

(6) The association shall have the power to make and collect assessments, and to lease, maintain, repair and replace the common elements.





(7) The association shall maintain accounting records according to good accounting practices which shall be open to inspection by unit owners at reasonable times. Such records shall include:

(a) A record of all receipts and expenditures.

(b) An account for each unit which shall designate the name and address of the unit owner, the amount of each assessment, the dates and amounts in which the assessment come due, the amounts paid upon the account and the balance due.

(8) The association, whether or not incorporated, shall have the power unless prohibited by the declaration of condominium, articles of incorporation, or bylaws of the association, to purchase units in the condominium and to acquire and hold, lease, mortgage and convey the same.

History and Source of Law

Derivation:
Laws 1965, c. 65-387, §§ 4, 5.
Laws 1963, c. 63-35, § 12.

The 1965 amendment deleted a reference giving the association power to execute contracts, deeds, mortgages, leases and other instruments appearing in the original act. The 1965 amendment also added subsection (8).

Library References

Associations ⇐1, 13 et seq. C.J.S. Associations §§ 1, 12 et seq., 20.

Notes of Decisions

In general 1
Cancellation or modification of leases 3
Mismanagement 2

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1. In general

Although promoters of condominiums caused associations operating them to be organized as corporations not for profit, promoters were entitled to have rules applicable to private corporations for profit applied to their activities, inasmuch as Condominium Act permits association that operates such a project to function as, but not limited to, a corporation for profit or corporation not for profit. Fountainview Ass'n, Inc., No. 4 v. Bell, App., 203 So.2d 657 (1967).

2. Mismanagement

Complaints in which non-profit associations incorporated under Condominium Act alleged that individual defendants after organizing associations and becoming sole officers, directors, and members of associations conveyed or leased land to associations on inflated terms and caused associations to enter into management contracts with third party at exorbitant fees did not state cause of action for recovery from defendants of any unconscionable profit made on sale or lease of land and construction of improvements thereon or for relief from excessive fees on management contracts, since defendants were sole members of association. Fountainview Ass'n, Inc., No. 4 v. Bell, App., 203 So.2d 657 (1967).

3. Cancellation or modification of leases

Evidence, in purported class action to cancel or modify leases on communal recreational facilities, sus-



BEST COPY AVAILABLE

tained findings that parking spaces for condominiums were adequate, that defendant promoters had not contracted to furnish lawn sprinkler system, that defendants had not contracted to erect fence along walkway that was alternate route around premises and that no impropriety in handling insurance claim had been established. Wechsler v. Goldman, App., 214 So.2d 741 (1968).

Although 99-year lease for use of communal recreational area imposed on condominium association exorbitant rental and returned excessive profit to promoters, purchasers of condominium apartment units who acquired knowledge of lease, and became guarantors thereof, at time of closing were not entitled to cancellation or modification of leases. Id.

Although rental obligation imposed on condominium associations while both lessee and lessor were owned or controlled by promoters was assertedly exorbitant, the associations were not entitled to have the rental revised to a realistic and reasonable amount. Id.

## 711.121 Associations to acquire and enter into agreements

In addition to any other provisions of this chapter, an association may acquire and enter into agreements whereby it acquires leaseholds, memberships and other possessory or use interests in lands or facilities including but not limited to country clubs, golf courses, marinas and other recreational facilities, whether or not contiguous to the lands of the condominium, intended to provide for the enjoyment, recreation or other use or benefit of the unit owners. All of such leaseholds, memberships and other possessory or use interests existing or brought into existence at the time of recording the declaration shall be set forth and fully described therein. Subsequent to the recording of the declaration, the association may not acquire or enter into agreements acquiring such leaseholds, memberships or other possessory or use interests except as authorized by the declaration and bylaws. The declaration and bylaws may declare the expenses of rental, membership fees, operations, replacements and other undertakings in connection therewith to be common expenses and may include covenants and restrictions concerning the use of the same by the unit owners and such other provisions not inconsistent with this law as may be desired.

**History and Source of Law**

**Derivation:**
Laws 1965, c. 65-9, § 1.

**Library References**

Associations ⇐10. C.J.S. Associations § 12 et seq.

## 711.13 Maintenance; limitation upon improvement

(1) The maintenance of the common elements shall be the responsibility of the association.



APPENDIX 3
25

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION JLK FWP

CASE NO: 75-38 Civ NCR

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida Condominium corporation, on behalf of itself and its stockholders and members,

Plaintiff,

-vs-

HERBERT BUCHWALD, Individually and as Trustee, and Buckley Development Company, Ltd.,

Defendants.

NOTICE OF FILING ANNEXATION TO COMPLAINT

FILED BY ____ D.C.
FEB 19 12 00 P.
JOSEPH L. BOGART
CLERK U.S. DIST. CT.
S.D. OF FLA MIAMI

Plaintiff, through counsel, gives notice of the filing of CONDOMINIUM DOCUMENTS of BUCKLEY TOWERS CONDOMINIUM, 1399 Miami Gardens Drive, Miami, Florida, as Exhibit A to the Complaint in this cause, copies of said Exhibit A having been annexed to and made a part of the copies of Complaint served upon the defendants in the cause.

Law Offices of Joseph S. Paglino
Counsel for Plaintiff
88 N.E. 79th Street
Miami, Florida 33138 (Tel. 758-8017)

By Joseph S. Paglino
Joseph S. Paglino, Esq.

APPENDIX 4
26

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION CASE NO. 75-38-Civ. - JLK

Filed: April 15, 1975

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida Condominium corporation, etc.,

Plaintiff

vs.

HERBERT BUCHWALD, et al.,

Defendants

MOTION TO DISMISS

The defendants, HERBERT BUCHWALD, individually and as Trustee, and BUCKLEY DEVELOPMENT LTD., move the Court as follows:

1. To dismiss the action on the ground that the Court lacks jurisdiction because the averments of the complaint are insufficient to show that the alleged restraint of trade or commerce affects interstate commerce.

2. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

3. To dismiss the action because it affirmatively appears on the face of the complaint and attachments that this action was not commenced within four years after the alleged cause



of action accrued and is therefore barred by the statute of limitations (15 U.S.C., Sec. 15b).

4. To dismiss the action because the complaint and attachments affirmatively show that no illegal tying arrangement is involved, in that the sale of condominium apartment units subject to a lease providing recreation facilities for the condominium unit owners clearly constitutes a single product, and not two separate products.

5. To dismiss the action because the plaintiff lacks standing to sue under 15 U.S.C. Sec. 15 as a person injured in its business or property, in that, plaintiff is not shown to have purchased or acquired a condominium apartment unit (tying product) under the alleged illegal tying arrangement or paid any of its own funds as rents on the recreation lease (tied product).

6. To dismiss the class action purportedly brought on behalf of the members of the plaintiff condominium association, as purchasers of the condominium apartment units and victims of the alleged tying arrangement, because the complaint wholly fails to allege any ultimate facts sufficient to form the basis for a class action.

7. To dismiss the pendent jurisdiction claim alleged in Count Two of the complaint for failure to state a claim upon which injunctive relief can be granted, in that plaintiff's prayer for the stay of the proceedings pending in the state court is prohibited by the applicable provisions of 28 U.S.C. Sec. 2283.

STEEL HECTOR & DAVIS
1400 First National Bank Building
Miami, Florida 33131
Attorneys for Defendants
By: s/ Darrey A. Davis
DARREY A. DAVIS
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss has been furnished to Joseph S. Paglino, Esquire, 88 N.E. 79th Street, Miami, Florida 33138, Attorney for Plaintiff, by mail, this 15 day of April, 1975.

s/ Darrey A. Davis
DARREY A. DAVIS



APPENDIX 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 75-38-Civ-JLK
(Filed: April 22, 1975)

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida Condominium Corporation, on behalf of itself and its stockholders/members,

Plaintiffs,

vs.

HERBERT BUCHWALD, Individually and as Trustee, and Buckley Development, Ltd.,

Defendants

RESPONSE TO MOTION TO DISMISS

Plaintiffs, through counsel, make the following response to the Motions thus far filed in this cause by defendants and say:

1. The averments to the complaint are sufficient to state a claim upon which relief can be granted, since the plaintiffs have standing to bring the action and have stated a claim cognizable under the Anti-trust laws of the United States. Upon factual proceedings, it will be shown that the plaintiff Condominium Association is a party to the illegal contract complained of and is obligated to make payment under the contract. In a similar case now pending in this District, the Court faced this argument and found that a Condominium Association does have standing to sue under the Anti-Trust

laws (Commodore Plaza at Century 21 Condominium Association, Inc., et al vs. Saul J. Morgan Enterprises, Inc., et al: Case No. 74-570-Civ-JE) and, due to the unique attributes of a Condominium Association, which exists only because of its members, can maintain the action on behalf of the membership/shareholders also. In any event, the allegations are sufficient to show standing by plaintiffs and a not insubstantial affect upon commerce. Any attack on jurisdiction based upon the degree of interstate commerce affected should be left to a trial of the merits and presentation of factual matters or evidence in support of or against the amount of commerce affected.

2. In reply to the argument that the complaint fails to state any claim under any theory of Anti-Trust law, it is submitted that under prevailing law, all that need be alleged is a per se violation of the Sherman Act which damages the plaintiff(s) personally and this has been alleged in the instant case.

3. In reply to the affirmative defense of defendants, that the Statute of Limitations has run, it is submitted that this defense is not properly raised by motion, but should be raised as an affirmative defense by answer and, in any event, if the violations are continuing in nature, as in the instant case, 15 U.S.C.A. 15(b) is not in point and an action will lie. In addition, in the event the affirmative defense of Statute of Limitations is raised by answer, it will be affirmatively shown that the defendants controlled the affairs of the plaintiff for a period of time and retained management of plaintiff's affairs so as to prevent the action being brought and thereby tolling the statute, since it would be unrealistic to expect defendants to have instituted suit against themselves.



4. In reply to the argument that the sale of a condominium and the tying of the sale to a recreation lease contract is merely the sale of a single product, it will be affirmatively shown at trial that the condominium sale in the instant case was made by one entity and the recreation lease is owned by different entities, have different legal descriptions and involved different contractual and legal obligations, so as to make them separate and divisible, although tied in violation of the Anti-Trust laws. Further, all that is necessary is to allege the per se (tying arrangement) so as to state a claim under the act. Any affirmative defense should properly be stated in a responsive pleading to the complaint.

5. In reply to the additional attack upon standing raised by defendants, as to the non-profit corporate plaintiff, it is submitted that the plaintiff has alleged that it is a damaged party and pays monies under the illegal contract, until disproven, this allegation must stand as true for the purposes of a Motion to Dismiss. In any event, the lease contract affirmatively shows that the non-profit corporate plaintiff is a party and is charged with paying rentals, where the monies are obtained for such payment is not an issue in this case and, at trial, it can be affirmatively shown that monies flow to the non-profit corporate plaintiff from various sources, although this is not in point either. In the event the motion to dismiss intimates that, in the event monies are not collected from individual members of the condominium the gross rental will abate, it is submitted that the contracts annexed to and made a part of the complaint belie this assertion.

6. In response to the attack on the complaint as being one in the nature of a class action, it is submitted that all that is needed to state a claim under the Sherman Anti-trust Act is to allege a per se violation by a party damaged, it is not nec-

essary to state a class action when a party sues on behalf of itself and its membership/stockholders and it has the authority to so represent its membership and stockholders.

7. As to the attack upon the pendent jurisdiction of this Court, it is submitted that, if in fact the complaint states a claim, then the Court can make a determination as to the similarity in facts, documents, etc, so as to determine whether or not pendent jurisdiction exists and whether or not the Court can grant the relief requested in any claim under pendent jurisdiction, but any attack upon the pendent jurisdiction of the Court at this juncture of the proceedings is premature.

In general, under most recent cases, there is no spatial requirement for jurisdiction to be asserted under the Antitrust acts, since restriction of *any part* of commerce is sufficient to bring the Act into play and hence the jurisdiction of the Court. In addition, if any (not-insubstantial) amount of commerce is affected, this is sufficient to give this Court jurisdiction to hear the case. However, as in most cases of this type, the amount of commerce affected or restricted can not be determined until factual matters are presented and tested by Answer discovery, etc, and any decision as to the merits should be withheld until trial of the cause. In fact, it is proper for a court to deny a Motion to Dismiss and in fact preferrable that it do so, if the Motion raises matters which involve factual determination, a resolution of which will not only affect jurisdiction, but also the very merits of the case.

For the foregoing reasons and for the reasons set forth in Plaintiffs Memorandum of Law filed herewith, it is respectfully requested that the Motion to Dismiss be denied, or in the alternative, that decision be reserved by the Court until the trial of the cause on the merits and, in addition, in the



the Court wishes to dispose of the motion on the record to date, that the plaintiffs be permitted oral argument and an evidentiary hearing and the opportunity to engate in discovery so as to be able to properly present its factual and evidentiary matters.

Respectfully submitted:

Law Offices of Jos. S. Paglino
Counsel for Plaintiffs
88 N.E. 79th Street
Miami, Florida 33138
(Tel. 758-8017)

By: s/ Joseph S. Paglino
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing Response to Motion to Dismiss was mailed this 21 day of April, 1975 to Darrey A. Davis Esq., Steel, Hector & Davis, Counsel for Defendants, 1400 First National Bank Bldg., Miami, Florida 33131.

s/ Joseph S. Paglino
Joseph S. Paglino, Esq.
Counsel for Plaintiffs

## APPENDIX 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 75-38-Civ-JLK
Filed: April 28, 1975

BUCKLEY TOWERS CONDOMINIUM, INC.,
a non-profit Florida Condominium Corporation, on behalf of itself and its stockholders/members,
Plaintiffs

vs.

HERBERT BUCHWALD, Individually and as Trustee, and Buckley Development, Ltd.,
Defendants

### MOTION FOR EVIDENTIARY HEARING

Plaintiffs, through counsel, move this Honorable Court for an Evidentiary Hearing as to jurisdiction of the United States District Court to hear this cause and for oral argument as to jurisdiction and would show this Court that the jurisdictional questions presented in this cause are intertwined inextricably with the merits of the cause so as to involve factual matters which should properly be resolved only at a trial of the merits of the cause, however, in the event the Court wishes to resolve the jurisdictional question prior to the trial of the cause, it is respectfully requested that evidentiary hearings and oral arguments be permitted in the cause.

WHEREFORE, Counsel for Plaintiffs moves, that in the event the jurisdictional issue is not reserved for decision at



the trial of this cause, that Evidentiary hearings and oral arguments be allowed on the Defendant's Motion to Dismiss for lack of jurisdiction and for failure to state a claim.

Respectfully submitted:

Law Offices of Joseph S. Paglino
Counsel for Plaintiffs
88 N.E. 79th Street
Miami, Florida 33138
(Tel. 758-8017)

By: s/ Joseph S. Paglino
Joseph S. Paglino, Esq.

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION CASE NO. 75-38-Civ.-JLK
Filed: May 8, 1975

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida Condominium corporation, etc.,

Plaintiff

vs.

HERBERT BUCHWALD, et al.,

Defendants

ORDER DENYING PLAINTIFF'S MOTION FOR EVIDENTIARY HEARING ON JURISDICTIONAL ISSUE

Upon consideration of the motion of the plaintiff for an evidentiary hearing on the question of jurisdiction presented in this action, it is

ORDERED AND ADJUDGED that said motion for evidentiary hearing is denied.

DONE AND ORDERED at Miami, Florida, this 8 day of May, 1975.

s/ James Lawrence King
UNITED STATES DISTRICT JUDGE



APPENDIX 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 75-38-Civ.- JLK
Filed: July 31, 1975

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida condominium corporation, etc.

Plaintiff,

vs.

HERBERT BUCHWALD, et al.,

Defendants

ORDER OF DISMISSAL

This cause came on for consideration upon the defendants' motion to dismiss the complaint for lack of subject matter jurisdiction, and for failure to state a claim upon which relief can be granted. The court, having considered the record and being fully advised in the premeses, finds and concludes that the above-styled action should be dismissed for failure to state a claim upon which relief can be granted.

On behalf of itself and its stockholders and members,* the Buckley Towers Condominium, Inc., a non-profit Florida

---

* Although the Plaintiff purports to bring this action on behalf of its members and stockholder, the association has expressly disclaimed any intention to maintain the present action as a class action. Consequently, there is no need to determine whether the action meets the requirements of Fed. R. Civ. P. 23.

Condominium Corporation, brought this action against Herbert Buchwald and the Buckley Development Company, the developers of the Buckley Towers Condominium. The Plaintiff alleges that the developers entered into a scheme which constitutes an unlawful tie-in, a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1. The plaintiff seeks treble damages, declaratory relief, and an inunction against certain state court civil proceedings.

In their motion, the defendants suggest several grounds for dismissing the action. The disposition of the motion, however, rests on the issue of standing.

For the purpose of deciding the motion to dismiss, the facts as they appear from the complaint and the exhibit attached to the complaint are presumed true. On August 6, 1968, the plaintiff was incorporated under Fla. Stat. § 617 as a non-profit corporation, and a condominium association under Fla. Stat. §711.12. According to the plaintiff's articles of incorporation, the purpose of the corporation is "to provide an entity responsible for the operation of a condominium in Dade County, Florida known as 'Buckley Towers, a Condominium.'". Membership in the association is limited to "all of the record owners of the condominium parcels of the Condominium." The association is empowered

> To acquire and enter into agreements whereby it acquires leaseholds, memberships or other possessory or use interests in lands or facilities, whether or not contiguous to the lands of the Condominium, intended to provide for the enjoyment, recreation, or other use or benefit of the unit owners.

Sometime prior to December 18, 1968, the plaintiff condominium association entered into a long-term lease of recreational facilities from the defendant, Mr. Buchwald. The



facilities are situated on land which is not a part of, but is adjacent to, the Buckley Towers Condominium. According to a formula set forth in the lease, the plaintiff is obligated to pay the defendant rent in excess of $18,700.00 per month. The "Community Facility Lease" further provides:

> Each and every person, whether real or corporate, who shall take any interest whatsoever in or to the Condominium described in Exhibit C [Buckley Towers West and Buckley Towers East] attached hereto, any of the Condominium's properties, or in or to an condominium parcels in the Condominium after the recording of this lease, by acceptance, delivery or the recording of the deed, contract, grant, assignment or other instrument granting, conveying or providing for such interest, or by the mere first exercise of the rights or uses granted herein, shall be deemed to consent to and ratify without further act being required, the provisions of this lease and especially the provisions of the entire Paragraphs IX [granting security interest in all condominium property to Lessor] and X [granting Lessor right to assign and encumber Lessor's interest in lease and demised premises ] to the same effect and extent as if such person or persons had executed this lease with the formalities required in deeds, for the purpose of subordinating and/or subjecting such person or persons' interests, in full, to the terms of this lease and granting the lien rights to Lessor provided for in this Paragraph X.

The terms of the Community Facility Lease also require the association

> "to assess its unit owners, excepting the recreation unit owner...in such amounts as shall be necessary

> to pay its obligations, payable in money to the Lessor hereunder, and to otherwise perform its covenants and promises herein.

On December 18, 1968, a copy of the recreation lease was filed in the Official Records of Dade County as an exhibit to the Declaration of Condominium of the Buckley Towers Condominium. To the extent here relevant, the declaration essentially incorporates, by reference the terms of the lease, and restates the provision relating to the condominium owner's ratification of the lease. Also, the declaration includes a provision which declares the rental fee a "common expense" for which the unit owners shall be assessed.

According to the plaintiff, the organization of the Buckley Towers Condominium is objectionable in that the purchaser of a condominium is required to accept and ratify the obligation to make rental payments on the Community Facility Lease. This arrangement, the plaintiff charges, constitutes an unlawful tie-in, a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1. Although the plaintiff must assess the unit owners for the funds paid on the lease, the association maintains that it is harmed by the obligation to pay unreasonable rent for the remaining 95 years of the 99-year lease.

Section 4 of the Clayton Act confers standing to bring a civil antitrust action for treble damages upon "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. §15. In construing Section 4, however, the courts have refused to confer standing upon every plaintiff whose injury is remotely traceable to an anti-trust violation, *Hawaii v. Standard Oil Company of California*, 405 U. S. 251, 262 (1972). As a result, the Courts of Appeal have devised various standards



for determining whether a party has standing. *Hawaii v. Standard Oil Company of California, supra* at 262 N. 14; *Battle v. Liberty National Life Insurance Company*, 493 F. 2d 39 (5th Cir. 1974); *In re Multidistrict Vehicle Air Pollution MDL No. 31*, 481 F. 2d 122 (8th Cir. 1973). The standards focus on the sufficiency of the causal relationship between the alleged violation and the harm to the plaintiff. *See, e.g., Battle v. Liberty National Life Insurance Co., supra. In re Multidistrict Vehicle Air Pollution MDL No. 31, supra.* The standard applied in the Fifth Circuit requires

> The plaintiff to show that he is "within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby."

*Battle v. Liberty National Life Insurance Company, supra* at 49, quoting *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F. 2d 414, 418 (4th Cir. 1966).

The difficulty with the present case is finding any connection at all between the harm to the plaintiff condominium association and the alleged tie-in. Throughout the complaint, the affidavit of the association president, and the plaintiff's memoranda, the plaintiff repeatedly stresses that the association is harmed by the obligation to pay allegedly unreasonable rent for 95 years. Since the Community Facility Lease, to which the plaintiff is a party, specifically provides for the amount and duration of the rental payments, the harm to the plaintiff flows directly from the association's liability on the lease. Thus for the plaintiff to have standing, the alleged tie-in must be the proximate cause of the plaintiff's liability on the lease.

However, the very structure of the alleged tie-in limits the circumstances in which a plaintiff, solely harmed by liability on the lease, is able to supply the requisite causal connection. The condominium association claims that the defendants have engaged in a practice of tying the obligation to make rental lease payments to the purchase of a condominium: the condominium unit is the tying product; and, the liability on the lease is the tied product. Given the structure of the tie-in, the causal connection between the alleged violation and the liability on the lease exists only where the plaintiff has purchased a condominium. Consequently, the plaintiff must be a purchaser.

A review of the complaint, and the affidavit of the association president, reveals not even the slightest suggestion that the association purchased a condominium unit to which the liability on the lease was tied. Instead, the facts alleged indicate that the plaintiff's obligations, under the Community Facility Lease, arose independent of the tie-in. The condominium association, shortly after it was incorporated, entered into a direct contractual relationship with the defendants for the lease of the recreational facilities. Under the circumstances of this case, the manner in which the plaintiff became obligated on the recreation lease is fatally inconsistent with the notion that the condominium association has standing to complain of the alleged tie-in. Therefore,it is

ORDERED and ADJUDGED that the above-styled action be and the same is hereby dismissed for failure to state a claim upon which relief can be granted.

DONE and ORDERED in chambers at Miami, Florida, this 31st day of July, 1975.

s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

cc: Steel Hector and Davis
Joseph S. Paglino, Esq.



**BUCKLEY TOWERS CONDOMINIUM, INC., a nonprofit Florida Condominium Corporation on behalf of itself and its stockholders and members, Plaintiffs-Appellants,**

**v.**

**Herbert BUCHWALD, Individually and as Trustee, et al., Defendants-Appellees.**

**No. 75-3463.**

**United States Court of Appeals, Fifth Circuit.**

**June 17, 1976.**

**A nonprofit condominium corporation brought an action against developers of the condominium, under first and second sections of the Sherman Act and under the treble damages section of the Clayton Act. A motion to dismiss the suit was granted by the United States District Court for the Southern District of Florida, at Miami, James Lawrence King, J., 399 F.Supp. 88, and leave to amend the complaint was denied. An appeal was taken by the condominium corporation. The Court of Appeals, Simpson, Circuit Judge, held that the alleged tying products were the residential condominium units and the tied product was recreational facilities and obligations to make rental payments thereon, and since the required causal connection of antitrust violations to injury could exist only with respect to purchasers of the condominium units, the condominium corporation had no standing to bring the action, even under the broader Clayton Act section providing for injunctive relief. In light of commencement of a second action alleging substantially the same claims brought by the condominium corporation and by an additional party on behalf of unit owners, the District Court did not abuse its discretion in denying the condominium corporation's motion to amend its complaint and add or join parties plaintiff.**

**Affirmed.**

**1. Monopolies ⇐28(1.6)**

**In action by nonprofit condominium corporation against condominium developers for alleged unlawful tie-in in violation of Sherman Act and for treble damages under Clayton Act, alleged tying products were residential condominium units and tied product was recreational facilities and obligation to make rental payments thereon, and condominium corporation had no standing to bring action under first or second sections of Sherman Anti-Trust Act or even under broader Clayton Act section providing for injunctive relief. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 4B, 16, 15 U.S.C.A. §§ 15, 15b, 26; Fed.Rules Civ.Proc. rule 59, 28 U.S.C.A.; West's F.S.A. §§ 617.01 et seq., 711.12, 711.121, 711.14.**

**2. Monopolies ⇐24(9)**

**Clayton Act section providing for injunctive relief is broader than treble damage section in that it does not require injury to "business or property" in order to achieve standing, but plaintiff under injunctive relief section must nevertheless demonstrate loss or injury cognizable in equity proximately resulting from the alleged antitrust violation. West's F.S.A. §§ 711.121, 711.14; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.**

**3. Federal Civil Procedure ⇐392**

**In light of commencement of second action alleging substantially same claims brought by appellant and by an addition-**

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INDEXED

al party on behalf of still other parties, district court did not abuse its discretion in denying appellant's motion to amend its complaint and add or join parties plaintiff.

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Appeal from the United States District Court for the Southern District of Florida.

Before DYER and SIMPSON, Circuit Judges, and FAY, District Judge.

SIMPSON, Circuit Judge:

Appellant, Buckley Towers Condominium, Inc., (hereinafter appellant or Buckley) a non-profit Florida condominium association brought this action (designated in the district court as No. 75–38–CIV–JLK), on behalf of itself and its stockholders and members, against the developers of the Buckley Towers Condominium for alleged violations of Sections 1 and 2 of the Sherman Act, Title 15, U.S.C., Sections 1, 2. Count I of the complaint alleged an illegal tying arrangement by the defendants-appellees in that the purchasers of condominium units in Buckley Towers are required to accept and ratify the obligation to make rental payments to the appellees under a lease of recreation facilities provided for the use of the unit owners. The appellant sought treble damages pursuant to Section 4 of the Clayton Act, Title 15, U.S.C., Section 15, in the amount of all monies paid by the appellant or its members under the lease trebled. In addition, although the complaint did not invoke jurisdiction under Section 16 of the Clayton Act, Title 15, U.S.C., Section 26, the appellant sought (i) the cancellation and rescission of the lease, (ii) a permanent injunction restraining the appellees from enforcing the terms of the lease, and (iii) the award to the appellant of title to the real property covered by the lease. The second count of the complaint sought ancillary relief in the form of a stay by the district court of state court proceedings brought by appellee Buchwald to compel enforcement of a state court approved settlement agreement between the parties, see *Buckley Towers Condominium, Inc. v. Buchwald*, Fla., 3 D.C.A. 1975, 321 So.2d 628, and requested that the appellant be allowed to deposit the rental payments due under the lease into the registry of the court pending a final determination of the suit. The district court on July 31, 1975, granted the appellees' motion to dismiss the suit for failure to state a claim upon which relief could be granted on the ground that since the appellant never purchased a condominium unit in Buckley Towers, it lacked standing to bring the action under Section 4 of the Clayton Act. *Buckley Towers Condominium, Inc. v. Buchwald*, S.D.Fla.1975, 399 F.Supp. 38.

Subsequent to the entry of the order of dismissal the appellant on August 11, 1975, moved the district court for clarification of the order of dismissal, and for leave to amend the complaint and to add or join as parties plaintiff the residential condominium unit owners. Further, on August 25, 1975, twenty-five days after the entry of the order of dismissal, the appellant filed in the court below a motion for reconsideration of the July 31, 1975 order of dismissal. The district court on August 27, 1975, granted the appellant's motion for clarification, and held that the order of dismissal was with prejudice. By the same order the district court denied the appellant's motion for leave to amend the complaint, holding that such motion was rendered moot by reason of the filing on August 6, 1975, of a substantially similar action, designated in the district court as No. 75–1549–CIV–JLK, by the appellant and by the owner of a residential condominium unit in Buckley Towers "individually and on behalf of all residential unit owners at the Buckley Towers Condominium".[1]



On September 8, 1975, the district court denied the appellant's motion for reconsideration of the order of dismissal of No. 75–38–CIV–JLK because the notice of appeal therefrom filed September 2, 1975, divested it of jurisdiction to reconsider. Appellant filed in this court a motion to remand the cause to the district court for the limited purpose of permitting a reconsideration of the order of dismissal. A panel of this court granted the limited remand by an order of November 17, 1975. On remand the district court held that it lacked authority to reconsider since appellant's motion for reconsideration was not filed or served within the ten-day period prescribed by F.R.Civ.P., Rule 59. See *Martin v. Wainwright*, 5 Cir. 1973, 469 F.2d 1072, 1073, cert. denied 411 U.S. 909, 93 S.Ct. 1538, 36 L.Ed.2d 199; *Albers v. Gant*, 5 Cir. 1970, 435 F.2d 146, 147.

The appeal before us is from the order below dismissing the action for failure to state a claim upon which relief could be granted. We affirm.

The complaint and the condominium documents appended thereto show that the appellant was incorporated August 6, 1968, as a non-profit corporation under Fla.Stat. Chapter 617, and a condominium association under Fla.Stat. Section 711.12. Pursuant to its articles of incorporation the condominium association has the responsibility for the operation and maintenance of the condominium, excluding the privately owned units, and is empowered "to acquire and enter into agreements whereby it acquires leaseholds, memberships, or other possessory or use interests in lands or facilities, whether or not contiguous to the lands of the Condominium, intended to provide for the enjoyment, recreation, or other use or benefit of the unit owners." The members of the appellant association consist solely of present record owners of units in Buckley Towers.

Buckley Towers Condominium, Inc. came into existence on December 17, 1968, with the recordation of the Declaration of Condominium in the public records of Dade County, Florida. The condominium project consists of two seventeen story buildings containing 564 residential apartment units, 5 shop units, and 23 recreation units. Simultaneously with the execution of the Declaration of Condominium Buckley leased for a period of 99 years from appellee Buchwald the property and facilities consisting of the 28 recreation units. The recreation units covered by the "Community Facility Lease" are located on land adjacent to the Buckley Towers Condominium, and leased for a total yearly rental payable in 12 monthly installments of over $18,700.00 each.

The Declaration of Condominium and the Community Facility Lease provide in part:

1. A copy of the complaint in No. 75–1549 appears in this record as an exhibit to the defendant's Memorandum in Opposition to Plaintiff's Motion (filed August 11, 1975) for Clarification of Order of Dismissal, Etc. We were informed by counsel at oral argument that No. 75–1549 was dismissed by Judge King as barred by the four year Statute of Limitations of the Clayton Act, Title 15, U.S.C. § 15b, and that an appeal from that dismissal is now pending before this court. We note from our own records the existence of such an appeal: No. 76–1848 styled Ignatz Spitz, etc., et al., Plaintiffs-Appellants, v. Herbert Buchwald, etc., et al., Defendants-Appellees.

"Each apartment and shop unit owner, his heirs, successors and assigns is bound by said community facility lease to the same extent and effect as if he had executed said lease for the purpose therein expressed, including but not limited to (a) subjecting all his right, title and interest in his apartment or shop unit, the condominium property and the Association to the lien rights granted the Lessor in Paragraph IX of said lease; (b) adopting, ratifying, confirming and consenting to the execution of the lease by the Association, as lessee; (c) covenanting and promising to perform each and every of the covenants, promises and undertakings to be performed by apartment or shop unit owners in the cases provided therefor in said lease; (d) ratifying, confirming and approving each and every provision of said lease and acknowledging that all of the terms and provisions thereof, including rental reserved, are reasonable; and (e) agreeing that the persons acting as directors and officers of the Association in the acquisition of such leasehold have not breached any of their duties or obligations to the Association. . . . The expense of rental, replacements, and other undertakings as set forth in the community facility lease are hereby declared to be common expenses. Each apartment owner shall have the right to use, occupy and enjoy the community facilities through the Association, as lessee, subject to all of the provisions of said community facility lease."

The lease further provides pursuant to Fla.Stat. Sections 711.121 and 711.14 [2] as follows:

"XIV. *DUTY OF LESSEE TO ASSESS AND PAY.* It shall be the duty of the Lessee to assess its unit owners, excepting the recreation unit owner, in accordance with the Florida Condominium Act, its Declaration of Condominium and By-Laws in such amounts as shall be necessary to pay its obligations, payble in money to the Lessor hereunder, and to otherwise perform its convenants and promises herein."

Upon recordation of the Declaration of Condominium and a copy of the Community Facility Lease as an exhibit thereto, appellee, Buckley Development Company, Ltd., became the owner of all units

2. Fla.Stat. Section 711.121 provides in pertinent part:

"In addition to any other provisions of this chapter, an association may acquire and enter into agreements whereby it acquires leaseholds, memberships and other possessory or use interests in lands or facilities including but not limited to country clubs, golf courses, marinas and other recreational facilities, whether or not contiguous to the lands of the condominium, intended to provide for the enjoyment, recreation or other use or benefit of the unit owners. . . . The declaration and bylaws may declare the expenses of rental, membership fees, operations, replacements and other undertakings in connection therewith to be common expenses and may include covenants and restrictions concerning the use of the same by the unit owners and such other provisions not inconsistent with this law as may be desired."

Fla.Stat. Section 711.14 as amended in 1975 provides in pertinent part:

"(1) Common expenses shall include the expenses of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association and any other expense designated as common expense by this law, the declaration or the bylaws.

(2) In a residential condominium, funds for the payment of common expenses shall be assessed against unit owners in the proportions or percentages of ownership of the common elements provided in the declaration."



in the condominium project. By April 8, 1971, all of the residential condominium units had been sold by the appellee-developer to individual purchasers. Certain of these units have been subsequently resold by the original purchasers. The appellant condominium association, however, has never purchased a condominium unit from either the appellee-developer or from an intermediate purchaser.

The gravamen of the appellant's claim is that the Declaration of Condominium and the Community Facility Lease create a tying arrangement in violation of Section 1 of the Sherman Act, in that the purchaser of a condominium unit in Buckley Towers is required to accept and ratify the terms of the recreation lease and the obligation to make rental payments to the appellees thereunder. The appellant asserts that although it is required by the terms of the Declaration of Condominium and the Community Facility Lease to assess the condominium unit owners, which constitute its membership, for the funds to pay the rental for the recreation facilities covered by the lease, it nonetheless has standing to maintain this action as lessee of the facilities, and because it is nominally liable for the payment of the rental on the leasehold under the terms of the lease.

We held in *Battle v. Liberty National Life Insurance Company*, 5 Cir. 1974, 493 F.2d 39, cert. denied 1975, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807, that in order to have standing to maintain an action for treble damages under Section 4 of the Clayton Act a plaintiff must satisfy two criteria: (1) the plaintiff must demonstrate an injury to its "business or property", and (2) the plaintiff must show that this injury was the result of the defendant's illegal activities. *Id.* at 49. See also *Hawaii v. Standard Oil Company of California*, 1972, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184; *Dailey v. Quality School Plan, Inc.*, 5 Cir. 1967, 380 F.2d 484; *Martin v. Phillips Petroleum Company*, 5 Cir. 1966, 365 F.2d 629, cert. denied 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451.

[1, 2] The application of these two standards to the facts here demonstrates that the district court correctly decided that the appellant lacked standing to maintain this action. Buckley has not alleged or shown as required by the second of the above criteria that the claimed antitrust violations caused injury to it in its business or property.

The district court correctly noted that the tied product is the recreational facilities and the obligation to make rental payments on those facilities, and the tying products are the residential condominium units in Buckley Towers. *Buckley Towers Condominium, Inc. v. Buchwald*, supra, 399 F.Supp. at 40. Thus, the required causal connection of antitrust violation to injury could exist only with respect to purchasers of the condominium units. Buckley's liability for the rental payments under the lease arose not as the result of its purchase of a condominium unit, but rather as a result of its direct contractual relationship with the appellees as lessee of the recreation units. The appellant has failed to show as required by the first criterion any injury to its "business or property", defined by the Supreme Court as "commercial interests or enterprises", *Hawaii v. Standard Oil Company of California*, supra, 405 U.S. at 264, 92 S.Ct. at 892, 31 L.Ed.2d at 193–94, from the claimed antitrust law violations.

Pursuant to the terms of the Declaration of Condominium and the Community Facility Lease, and as required by Florida Statute Sections 711.121 and

711.14, (see note 2 supra) the rental payments on the lease are common expenses which are paid by the association through assessments upon the condominium unit owners. Buckley acts solely as a conduit in collecting the assessments from the unit owners and paying the rental to the appellees. The association thus is not injured in its commercial interests or enterprises as a result of the alleged unlawful tying arrangement. Indeed, in the strict sense it has no *commercial* interests or enterprises.

Similarly lacking in merit is the appellant's fall-back assertion that it had standing to maintain on behalf of itself and its members an action for injunctive relief under Section 16 of the Clayton Act. Title 15, U.S.C., Section 26. Although Section 16 is broader than Section 4 in that it does not require an injury to "business or property", in order to achieve standing under Section 16 a plaintiff must demonstrate a loss or injury cognizable in equity proximately resulting from the alleged antitrust violation. See *Hawaii v. Standard Oil Company of California*, supra, 405 U.S. at 260–62, 92 S.Ct. at 890, 31 L.Ed.2d at 191–92; *Zenith Radio Corp. v. Hazeltine Research*, 1969, 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129, 152; *Jeffrey v. Southwestern Bell*, 5 Cir. 1975, 518 F.2d 1129, 1132; *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 5 Cir. 1973, 476 F.2d 989. Leaving aside the alleged damage to the residential condominium unit owners the appellant-association has not alleged and we do not apprehend any damage cognizable in law or equity sufficient to confer standing to sue upon Buckley even under the eased requirements of Section 16.[3]

[3] Finally, we hold that the district court did not abuse its discretion in denying the appellant's motion to amend its complaint and add or join parties plaintiff, in light of the commencement of a second action alleging substantially the same claims brought by the appellant and by an individual condominium unit owner on behalf of all residential unit owners at the Buckley Towers Condominium. *Ignatz Spitz, etc., et al. v. Herbert Buchwald, etc., et al.*, S.D.Fla., 75–1549–CIV–JLK. *Cf. Miller v. Granados*, 5 Cir. 1976, 529 F.2d 393.

AFFIRMED.

3. The decision of the Supreme Court as to the standing of certain organizations and associations to attack zoning ordinances and other actions of town boards, in *Warth v. Seldin*, 1975, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343, is inapposite here. The Court in *Warth* held that an association may have standing as the representative of its members even in the absence of injury to itself, but the association must allege that its members are suffering or threatened with injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves been parties to the suit. *Id.* 422 U.S. at 509–13, 95 S.Ct. at 2211–12, 45 L.Ed.2d at 361–62. This holding was limited, moreover, by the statement that the association must show that "the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause . . . ." *Id.*



UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3403

D. C. Docket No. CA 75-38 JLK

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit, Florida Condominium Corporation on behalf of itself and its stockholders and members,
Plaintiffs-Appellants,

versus

HERBERT BUCHWALD, Individually and as Trustee, ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the Southern District of Florida

Before DYER and SIMPSON, Circuit Judges, and FAY, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

June 17, 1976



UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EDWARD W. WADSWORTH
Clerk

Office of the Clerk
September 21, 1976
Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

NO. 75-3403 - Buckley Towers Condominium, Inc., etc. vs. Herbert Buchwald, etc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: s/ Clare F. Sachs
Deputy Clerk

cc: Mr. Joseph S. Paglino
Mr. Darrey A. Daivs

## APPENDIX 10

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO: 75-38
Filed: January 10, 1975

BUCKLEY TOWERS CONDOMINIUM, INC.,
a non-profit Florida Condominium corporation,
on behalf of itself and its stockholders and
members,

Plaintiff

vs.

HERBERT BUCHWALD, Individually and as
Trustee, and Buckley Development Company,
Ltd.,

Defendants

COUNT I

The Plaintiff, Buckley Towers Condominium, Inc., on behalf of itself and its stockholders and membership, hereinafter called Condominium Association, sues the Defendants, Herbert Buchwald, individually and as trustee, and Buckley Development Company, Ltd., a limited partnership, and says:

1. Jurisdiction is founded on the existance of a Federal question arising under 15 U.S.C. 1 and 2.



2. The Plaintiff, a Condominium Association, engaged in interstate activities, brings this action on behalf of itself and its members and shareholders pursuant to the provisions of 15 U.S.C. 15 and 28 U.S.C.A. 2201, and alleges that the Plaintiff is an entity which is injured in its business or property by reason of Defendants violations of 15 U.S.C. 1 and 15 U.S.C. 2 and that the offense is a continuing one which occurs both directly in commerce and, in addition, that the intrastate activities of Plaintiff involved herein have a not insubstantial effect upon commerce.

3. That on or about December 18, 1968, the Defendants herein, caused to be recorded in the Official Records of Dade County, Florida, at Official Records Books 210, page 443, a lease agreement, as part of a combination in restraint of trade and scheme for the purpose of obtaining monies illegally and improperly from the intended membership and shareholders of Plaintiff corporation and from Plaintiff corporation, as hereinafter alledged, which leasehold substantially affects and restrains the interstate and intrastate business of Plaintiff and others.

4. That, on or about December 18, 1968, the Defendants herein, caused to be recorded a certain instrument known as a Declaration of Condominium for Buckley Towers Condominium,said instrument being recorded among the public records of Dade County, Florida, at Clerk's File #68R-205396 and, one of the reasons for causing the preparation and recordation of this document was to aid and abet in the execution of the combination and scheme to violate 15 U.S.C. 1 and 2 as stated hereinabove and create a controlled marketing area and monopoly insofar as the sale of Condominium Units and recreational facilities at Buckley Towers Condominium was concerned.

5. That, by virtue of the above noted documents and the scheme developed by Defendants herein, it was sought to restrain and restrict the said Condominium purchasers as shareholders and members of Plaintiff and to also restrict Plaintiff, to the use of and compel the lease of a recreation area owned by the Defendant herein, Herbert Buchwald, trustee and certain other diverse associates of Herbert Buchwald, trustee, as beneficiaries of said trust, said area being adjacent to the Buckley Towers Condominium Complex and originally a part of one common piece of property which was later partitioned and upon which were constructed the Condominium Complex improvements and the leased recreational area.

6. That the scheme used to violate the provisions of 15 U.S.C. 1 and 15 U.S.C. 2, was to cause Plaintiff herein and the membership of Plaintiff herein as Condominium unit purchasers at the aforesaid Condominium to be bound for payment of the rental on the aforesaid 99 year leasehold contract for the full term of said lease, a period in excess of 95 years.

7. That, the defendants herein, arbitrarily, and without resort to any commonly accepted standards of valuation, set an exorbitantly high monthly rental on the aforesaid recreation lease area, to wit: a sum in excess of $12,900.00 per month, to be additionally increased from time to time by the Cost of Living Index for the entire 99 year term, without providing any additional benefits or consideration. Notice of the first such increase having been given for an increase as of January 1, 1975, so as to increase the monthly rentals to the sum of $18,777.00 an increase in excess of 44% from the original rental.

8. That the dwelling units at the Condominium were



offered for sale to prospective purchasers from among the several states throughout the United States of America, and, as a condition precedent to and an absolute requirement of all purchasers of Condominium units at Buckley Towers Condominium, the Defendants, required that each unit purchaser, adhere to, guarantee, ratify and accept and agree to be bound to the terms of the aforesaid 99 year leasehold and that sales from the said tying arrangement exceeded 10 million dollars.

9. That it was well known, or should have been well known, to the Defendants and persons or entities controlled by the Defendants, including the then directors and officers of Plaintiff Condominium Corporation, who at that time were different from the present officers and directors and were persons controlled by or who acted at the direction of Defendants herein, that the foregoing scheme was an illegal tying and pricing arrangement, which was practiced upon unit purchasers, in order to discourage or restrain them from seeking membership in, or joining other recreational oriented facilities, or preventing Plaintiff from providing its own recreational facilities upon Condominium property, by the device of discouraging same, by causing the aforesaid unit purchasers and members of plaintiff to pay monies as an absolute requirement for the use of the aforesaid recreational leased area, although there was no valid business purpose for same, during their ownership of and residence at the Buckley Towers Condominium Complex, whether or not the member of Plaintiff actually used the recreation facilities or not and by artificially partitioning the property as aforesaid.

10. That, in addition thereto, it was known, or should have been known, by the defendants at the time of the execution of the aforesaid lease document, that the leasehold premises consisted of lands and certain improvements there-

on which served no valid business purpose for the Condominium Association, which could not have been provided on the Condominium property itself, had not the Defendants engaged in the scheme to artificially partition the said property so as to create a Condominium Complex under one ownership and a leasehold area under a different ownership so as to enable the Defendants to carry out the illegal tying arrangement aforesaid and illegally obtain monies thereby.

11. That, the said tying arrangement aforesaid, by the device of requiring that all future purchasers of Condominium units at Buckley Towers Condominium attorn to and recognize the leasehold obligations aforesaid, provides thereby for the establishment and maintenance of a minimum resale price on each and every Condominium unit at the aforesaid Condominium Complex since, any future purchaser must, as a condition precedent to the purchase of a Condominium unit, and as a tying arrangement thereby, agree to be bound to pay, as an absolute minimum for the purchase, the rental on the aforesaid recreation lease and, in the event such agreement is not coerced or obtained, the sale of the Condominium unit will not be permitted by the Lessor or assigns of the 99 year lease aforesaid and, the said Lessor may enforce this restraint on alienation of property by certain punitive clauses in the aforesaid leasehold and by economic duress, including, but not limited to, the foreclosure of any ownership interest in the unit by the then unit owner or purchaser.

12. That the Defendants did, together with certain controlled entities and individuals, individually and in conspiracy each with the other, by the device of monopolizing ownership through alter-egos, artificially partitioning land, recording of the aforementioned leasehold document and



declaration of condominium, attempt to and effectively did succeed in monopolizing the sale of Condominium units and tying to the said sales, a contract for the use of a recreational facility and did further, fix a price thereon far in excess of the reasonable value thereof, by the scheme and device of the 99 year lease.

13. That as a result of the aforesaid acts, the Defendants did complete the scheme in restraint of trade and monopolization of such trade and caused a not insubstantial effect upon commerce and damages to Plaintiff and its members.

14. That, as a result of the foregoing, the leasehold contract and tying arrangement, is improper and illegal as violative of 15 U.S.C. 1 and 2 and the general policy of the anti-trust act, and this Court has jurisdiction of this cause due to the foregoing.

WHEREFORE, plaintiff demands the cancelation and rescision of the 99 year lease contract and ancillary obligations; a permanent injunction against the Lessor-trustee, any beneficiaries of the Trustee, any heirs, assigns or successors, in interest to the Trustee, from enforcing any of the terms or conditions of the 99 year lease; restitution and recovery of all monies paid by the Plaintiff or its members to the Defendants as Trustee, or any beneficiary of the Trustee, under the terms of the said 99 year leasehold, as damages thereto, and threefold the damages so sustained by the Plaintiff or its membership, together with the costs of this lawsuit,including but not limited to a reasonable attorneys fee; award to the Plaintiff or its membership of any real property covered by or encumbered by the said leasehold as damages, and such other relief as this Honorable

Court deems fit and proper and further, Plaintiff, on behalf of itself and its membership, demands a trial by jury as to all issues triable as of right by jury hereunder.

COUNT II

15. Plaintiff, on behalf of itself and its membership realleges each and every of the allegations in paragraphs 1 through 14 of this Complaint.

16. That the Defendant, Herbert Buchwald, trustee, has made demands for rental under the aforesaid lease contract and agreements arising from consolidated Civil Action No: 70-23629, 71-551 and 71-1619, all in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, and maintains that the said lease contract is not violative of the anti-trust laws of the United States, to wit: 15 U.S.C.A. 1 and 2, and that Plaintiff herein has obligations to defendant under said lease.

17. That Plaintiff herein is of the belief that the said lease contract and any obligations arising thereunder or ancillary agreements concerning the said lease contract are violative of the anti-trust laws, to wit: 15 U.S.C. 1 and 2, due to the illegal tying arrangement involved in the transaction which bound Plaintiff and its present and future membership to the said lease contract and attendant obligations and that the violations aforesaid are per se violations of 15 U.S.C. 1 and 2, as well as generally violative of the anti-trust acts.

18. That by reason of the foregoing, and the conflicting claims of the Defendant and Plaintiff, Plaintiff is in great doubt as to the legality of the lease contract as



measured against the anti-trust laws, to wit: 15 U.S.C. 1 and 3, and, in accordance with its obligations to itself and its membership, Plaintiff must seek a determination of its rights and obligations under the said statutes as to the terms and conditions of the aforesaid 99 year lease contract and ancillary obligations or agreements arising therefrom.

WHEREFORE, Plaintiff, on behalf of itself and its membership, demands that the Court adjudge:

1. That the aforesaid tying arrangement involving the sale of a Condominium unit to mbmers of Plaintiff, only on the pre-condition that the said members also become obligated under the aforesaid 99 year leasehold contract and ancillary obligations is violative of the anti-trust laws of the United States, to wit: 15 U.S.C. 1 and 2 and that the Court can give ancillary relief thereto to Plaintiff and its membership.

2. That the Court find that the aforesaid tying arrangement violates the general principals and policies as set forth by the United States in its anti-trust laws, to wit: 15 U.S.C. 1 and 2 and is a per se violation of the said anti-trust laws of the United States and non-enforceable by any Court of the United States or the State of Florida or the County of Dade.

3. That all factual questions or issues which are triable as of right by jury, be so tried by a jury.

4. That the Court cancel and rescind the 99 year leasehold contract and any ancillary agreements, contracts or obligations arising thereunder; that the Court permanently enjoin the Lessor, beneficiaries, heirs, assigns or successors

in interest to the lessor or the beneficiaries under the said lease, from enforcing any of the terms or conditions of the aforesaid 99 year lease contract or obligations arising thereunder, restitution and recovery by the Plaintiff and its membership of all monies paid by the Plaintiff or its membership to the Defendants or any beneficiaries pursuant to the aforesaid lease contract as damages, award of any real property covered by the leasehold obligation to Plaintiff and its membership as damages and threefold the damages so sustained by the plaintiff and/or its members, together with the costs and expenses of this lawsuit, including but not limited to a reasonable attorneys fee and such other relief as this Honorable Court deems fit and proper and further, Plaintiff reiterates its demand for a trial by jury as to all issues triable as of right by jury thereunder.

5. That the Plaintiff be allowed to deposit a sum equal to the amount of rentals claimed under the aforesaid 99 year lease contract into the registry of the Court or place same in Treasury Notes or Certificates of Deposit as security for said disputed rentals until the issues in this cause are resolved.

6. That this Court stay any proceedings in the Dade County Circuit Court or other Florida State Courts during the cause of these proceedings or grant such other relief to Plaintiff from State action as the Court deems proper.

BUCKLEY TOWERS CONDOMINIUM, INC, a non-profit Florida condominium corporation, on behalf of itself and its membership.

By: s/ Ignatz Spitz, President
IGNATZ SPITZ, President



LAW OFFICES OF JOSEPH S. PAGLINO
Counsel for Plaintiff
88 N.E. 79th Street
Miami, Florida 33138
(305) 758-8017

By: s/ Joseph S. Paglino
Joseph S. Paglino, Esq.

APPENDIX 11

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EDWARD W. WADSWORTH
Clerk

Office of the Clerk
Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

September 21, 1976

TO ALL COUNSEL OF RECORD

NO. 75-3403 - Buckley Towers Condominium, Inc.
etc. vs. Herbert Buchwald, etc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk



By: s/ Clare F. Sachs
Deputy Clerk

cc: Mr. Joseph S. Paglino
Mr. Darrey A. Davis